IN THE

Supreme Court of the United States

OCTOBER TERM, 1960.

No. 63

EUGENE C. JAMES,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF FOR PETITIONER

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BRIEF FOR PETITIONER.

OPINION BELOW.

The opinion of the Court of Appeals for the Seventh Circuit (R. 19) is reported in 273 F.2d 5.

JURISDICTION.

The judgment of the Court of Appeals for the Seventh Circuit affirming a judgment of the District Court for the Northern District of Illinois (R. 16) was entered on December 29, 1959 (R. 22). A timely petition for rehearing was denied on February 29, 1960 (R. 23). The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1), 62 Stat. 928. Certiorari was granted on May 16, 1960.

STATUTES INVOLVED.

Internal Revenue Code of 1939:

Sec. 22. GROSS INCOME.

(a) General Definition.—"Gross Income" includes gains, profits, and income derived from salaries, wages, or compensation for personal service * * * of whatever kind and in whatever form paid, or from professions, vocations, trades, businesses, commerce, or sales, or dealings in property, whether real or personal, growing out of the ownership or use of or interest in such property; also from interest, rent, dividends, securities, or the transaction of any business carried on for gain or profit, or gains or profits and income derived from any source whatever. * * *

(26 U.S.C. 1952 ed., Sec. 22(a).)

SEC. 145. PENALTIES.

* * *

(b) Failure to Collect and Pay Over Tax, or Attempt to Defeat Tax.—Any person required under this chapter to collect, account for, and pay over any tax imposed by this chapter, who willfully fails to collect or truthfully account for any pay over such tax, and any person who willfully attempts in any manner to evade or defeat any tax imposed by this chapter or the payment thereof, shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, be fined not more than $10,000 or imprisoned for not more than five years, or both, together with the costs of prosecution.

* * *

(26 U.S.C. 1952 ed., Sec. 145(b).)

Internal Revenue Code of 1954:

SEC. 61. GROSS INCOME DEFINED

(a) General definition.—Except as otherwise provided in this subtitle, gross income means all income from whatever source derived, * * *

* * *

(26 U.S.C. 1952 ed., Supp. IV, Sec. 61(a).)

SEC. 7201. ATTEMPT TO EVADE OR DEFEAT TAX

Any person who wilfully attempts in any manner to evade or defeat any tax imposed by this title or the payment thereof shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, shall be fined not more than $10,000, or imprisoned not more than 5 years, or both, together with the costs of prosecution.

(26 U.S.C. 1952 ed., Supp. IV. Sec. 7201.)

QUESTION PRESENTED.

1. Whether the receipt of embezzled funds (where the fact of such embezzlement has been specifically found by the Trial Court and has been made the subject of criminal prosecution) constitutes the receipt of taxable income in the hands of the embezzler.

STATEMENT OF THE CASE.

1. The Indictment.

This prosecution was commenced on December 13, 1957, by the return of an Indictment in four Counts, the first three being under Section 145(b) of the Internal Revenue Code of 1939 (26 U.S.C. 145(b)) and the fourth Count being under the then newly applicable successor, Section 7201 of the Internal Revenue Code of 1954 (26 U.S.C. 7201).

The first Count of the Indictment charged the petitioner with willfully attempting to defeat and evade a large part of the income tax due and owing by him and his wife to the United States for the year 1951 by filing a joint return for that year showing $2,353.44 due, whereas it is alleged that the petitioner knew that there was $70,037.14 owing for his tax liability for that year. The second Count charged the same offense for the year 1952, the return showing $5,997.38 due, whereas it was alleged that the petitioner knew there was due $166,195.67. The third Count related to the year 1953, for which the return showed a tax liability of $3,107.88, whereas it was alleged that the petitioner knew the amount due was $325,323.04. The fourth Count concerned the year 1954 for which the tax liability as reported was $2,962.88, whereas the Indictment alleged the petitioner knew that the amount due was $15,847.90.

2. The Trial.

The cause was tried to the court upon waiver of trial by jury, consented to by the government and approved by the court. (R. 5, 6). At the close of the evidence for the prosecution the petitioner orally moved for a judgment of acquittal, which motion was denied.

At the close of all of the evidence, the petitioner again moved orally for a judgment of acquittal, which motion was again denied. The court then found the petitioner guilty on each Count (R. 16).

3. The Special Findings of Fact.

The court, acting under Rule 23(c) of the Federal Rules of Criminal Procedure, entered most detailed Findings of Fact, specially finding all material facts as disclosed by the evidence and additionally finding ultimate facts and conclusions of law (R. 6 through 16).

Because of the detailed and fulsome Special Findings of Fact entered by the Trial Judge, which appear in their entirety in the Record as above referenced, it is believed unnecessary in this Statement of Facts for this petitioner to do other than here again, for the convenience of this Court, repeat such special findings as the same were made and entered by the Court, as the tryer of the facts (R. 6 through 14).

"Petitioner filed timely joint income tax returns for himself and his wife for the years 1951, 1952, 1953 and 1954 with the District Director of Internal Revenue at Chicago, Illinois.

"The income reported by petitioner on his returns consisted of salary received from the Laundry Workers Union, Local No. 46, located in Chicago, Illinois, salary from the Laundry Workers International Union, whose headquarters were in Indianapolis, Indiana; salary from Local No. 985 of the International Brotherhood of Teamsters, located in Detroit, Michigan; certain payments received as a Welfare Deputy for the aforementioned Local No. 46; certain expense monies received from afore-

mentioned Local No. 46. He also reported net losses from the operation of a racing stable.

"From January 1, 1950 to August 7, 1952, petitioner was seventh Vice President and Acting General Secretary and Treasurer of the Laundry Workers International Union. From August 7, 1952 to December 31, 1954 defendant was General Secretary and Treasurer of the Laundry Workers International Union. In addition, he was Deputy Trustee in charge of Local No. 46 of the Laundry Workers Union from May 13, 1949 until October, 1954, during which period the Local was under a trusteeship. Upon termination of the trusteeship in October, 1954, he became Secretary and Treasurer of the Local.

"Throughout the years 1951 to 1954 inclusive there was in existence a welfare trust known as the Social Security Department of the Laundry Workers International Union. The trust had been created pursuant to a mandate of the 1949 Convention of the Laundry Workers International Union. The Social Security Department was an entity separate and distinct from the Laundry Workers International Union. The purpose of the trust known as the Social Security Department was to provide welfare benefits for union members. The Social Security Department was governed by six trustees, three of whom were selected by Management and three by Labor. At no time was the defendant a trustee or other officer of the Social Security Department.

"Petitioner was appointed Welfare Deputy for Laundry Workers Local No. 46 of Chicago under a written agreement with the Social Security Department executed on October 9, 1960. This agreement provided, among other things, that petitioner was to receive 5 per cent of all premiums payable to the Security Mutual Life Insurance

Company under the latter's contract covering members of Local No. 46, and that expenses incurred by defendant in investigating claims were to be paid by him out of this sum. The agreement between petitioner and the Social Security Department contained the following clause:

> "* * * Should any surplus remain after payment of said items then it may be retained (by petitioner), provided, however, that such surplus shall be reported as income (by petitioner) in accordance with law. * * *"

In his returns for the years in question, petitioner reported as gross income sums allegedly representing the difference between the amounts received and the amounts expended under the agreement.

"The Social Security Department received payments from various employers throughout the country on behalf of union employees, which payments were deposited by the bookkeeper for the Social Security Department in the Indiana National Bank of Indianapolis, Indiana. The receipt of these funds was regularly recorded by the bookkeeper of the Social Security Department.

"From April, 1950 to and including October 1, 1953, the Security Mutual Life Insurance Company of Binghamton, New York, by contract with the Social Security Department of the Laundry Workers International Union, had in effect health and accident insurance policies covering the members of the various laundry workers' local throughout the country. For the period March 1951 to October 1, 1953, premiums on the health and accident policies were paid by the Social Security Department to one Louis B. Saperstein of Newark, New Jersey, an insurance broker and agent for the Security Mutual Life Insurance Company.

"Louis B. Saperstein was the Managing Officer of two insurance brokerage firms known as the Harlew Agency of Illinois, Inc. and the Harlew Agency of California, Inc. All checks for payment of premiums to the Security Mutual Life Insurance Company by the Social Security Department were made payable to Louis B. Saperstein and were deposited by him, or persons employed by him, in bank accounts of either Harlew Agency of Illinois, Inc. or Harlew Agency of California, Inc.

"The funds received by Louis Saperstein from the Social Security Department during the years 1951 to 1953 inclusive were wholly disbursed by him for the following purposes:

(a) Payments to the Security Mutual Life Insurance Company of Binghamton, New York, as premiums on the policies in existence between that company and the Social Security Department for the Laundry Workers International Union;

(b) Payments of claims made by laundry worker employees who, under the terms of the policies, were ineligible to receive benefits from the Security Mutual Life Insurance Company;

(c) By checks drawn to the Order of the Laundry Workers International Union and mailed to the defendant at his residence in Wheaton, Illinois, or at his office in the headquarters of Local No. 46 of the Laundry Workers International Union at 1640 West Van Buren Street, Chicago, Illinois.

"On September 14, 1951, petitioner opened a bank account at the Merchants National Bank, Chicago, Illinois, in the name of the Laundry Workers International Union. This bank account was opened without the author-

ization of the Laundry Workers International Union or the Social Security Department. The signature card for this bank account required only the signature of petitioner to effect withdrawals from the account.

"Petitioner deposited in the above-mentioned Merchants National Bank account all checks received by him from Saperstein which were payable to the Laundry Workers International Union, and which were drawn on accounts of Harlew Agency of Illinois, Inc. and Harlew Agency of California, Inc.

"The funds so received by petitioner and deposited by him in the Merchants National Bank during the years 1951, 1952, 1953 and 1954 amounted to $80,451.35; $175,265.81; $368,367.81, and $29,561.69 respectively.

"*The funds referred to in (the preceding two paragraphs) were under the laws and statutes of the State of New Jersey embezzled by the petitioner, and that under the laws and statutes of such State, the petitioner, James, is guilty of the crime of embezzlement of such funds as a principal, along with Saperstein.* (Emphasis supplied.)

"That Saperstein and the petitioner were jointly indicted for the crime of conspiracy to embezzle and for the crime of embezzlement of the funds in question by the Grand Jurors of Essex County, New Jersey, and that such indictment is now pending in the courts of that state; and the petitioner has been ordered extradited for trial in New Jersey by order of the Circuit Court of Du Page County, Illinois, which order was affirmed by the Supreme Court of Illinois on March 20, 1959; that there is now pending before the Supreme Court of Illinois a petition for rehearing of the aforesaid order of affirmance.

"By letters dated July 17, 1951 and July 27, 1951, petitioner stated to the Security Mutual Life Insurance Company that members of the Laundry Workers International Union were performing services and incurring expenses in connection with the promotion of the welfare plans, and that in his opinion such functions and expenses were properly the burden of the insurance company. Accordingly, he requested that the insurance company consider reimbursing the union for these expenditures. By letter dated September 10, 1951, addressed to petitioner the insurance company agreed to pay the union $2,500.00 a month as reimbursement for such expenses. The agreement was made retroactive to January, 1951. Pursuant to this agreement, one check for $20,000.00, covering the retroactive period, was made payable to the Laundry Workers International Union; one check for $2,500.00 was made payable to E. C. James; the remaining monthly checks in the amount of $2,500.00 each were made payable to E. C. James, Acting Secretary-Treasurer of the Laundry Workers International Union. All of the checks were mailed to petitioner, endorsed by rubber stamp, and deposited by him in the above-mentioned account at the Merchants National Bank. For the years 1951, 1952 and 1953 the sums so received and deposited by the petitioner totaled $30,000.00, $32,500.00 and $22,500.00 respectively. The representations made by the petitioner to the Security Mutual Life Insurance Company in the aforementioned letters, as a result of which the above sums of $2,500.00 a month were paid by the insurance company, were made without authorization of any other officer of the Laundry Workers International Union or any trustee of the Social Security Department.

"That the acts of the petitioner referred to in (the preceding paragraph) constituted the crime of embezzle-

ment of the $85,000.00 therein referred to under the laws and statutes of the State of Illinois. (Emphasis supplied.)

"On numerous occasions during the years 1951 to 1954 inclusive, petitioner visited the Merchants National Bank of Chicago, Illinois, and drew checks on the account maintained by him at this bank in the name of the Laundry Workers International Union. These checks were drawn to the order of E. C. James and were immediately cashed by him at the bank. During the years in question, petitioner received from the above sources (*i.e.*, the Harlew Agencies, Inc. and the Security Mutual Insurance Company) and deposited in the Merchants National Bank the following sums:

1951	$110,451.45
1952	207,765.81
1953	390,867.81
1954	29,561.69
Total	$738,646.66.

By May 6, 1954, petitioner had withdrawn all funds which he had deposited in this account.

"None of the funds in question were paid over by the petitioner to the Laundry Workers International Union or the Social Security Department, and no part of the funds was expended by the petitioner for the benefit of the aforementioned union entities.

"During the years involved petitioner maintained safe deposit boxes at the Gary-Wheaton Bank in Wheaton, Illinois, the town in which he resided, to which safe deposit boxes he made frequent entries. During the year 1951 he made nineteen visits to the boxes; during the year 1952 he made twenty-two visits to the boxes; during

the year 1953 he made nineteen visits to the boxes; during the year 1954 he made ten visits to the boxes.

"Throughout the period in question, petitioner also maintained three checking accounts and one savings account at the Gary-Wheaton Bank at Wheaton, Illinois. In addition, he maintained two checking accounts at the Central National Bank in Chicago, Illinois. Petitioner made cash deposits to his accounts at the Gary-Wheaton Bank in each of the years 1951, 1952, 1953 and 1954 totaling $27,990.00, $51,860.00, $15,200.00, and $14,310.00 respectively.

"In addition to the currency deposits during this time, which exceeded $109,000.00, defendant purchased a horse from Leopha Wilson in November, 1953, for $10,000.00 in currency. This currency was not withdrawn from any of defendant's bank accounts.

"On November 17, 1953 petitioner purchased a cashier's check at the Gary-Wheaton Bank in the amount of $2,500.00. There was no withdrawal of a like amount from any of his bank accounts on this date. However, on this same date he made an entry into his safe deposit box at the Gary-Wheaton Bank. As testified to by Matthew J. Dooley, there was mailed to petitioner on December 28, 1953, $27,000.00 worth of stock in the Founders Syndicate of America, Inc., the certificates of which were made out in dummy names and endorsed in blank. This stock resulted from a purchase by Dooley on behalf of a group, including petitioner, which group, in the presence of Dooley, had agreed to produce the funds to buy the stock.

"An analysis of petitioner's various back accounts does not show the withdrawal of $27,000.00 or the withdrawal of any series of checks which would account for the $27,-

000.00. Petitioner's contribution for the purchase of the stock was by cash not withdrawn from his bank accounts.

"None of the funds withdrawn by petitioner from his several accounts at the Gary-Wheaton Bank and the Central National Bank of Chicago during the years 1951 through 1954 were expended on behalf of the Laundry Workers International Union or the Social Security Department, but instead were expended in part for his personal use and benefit.

"The funds received by the petitioner during the years 1951, 1952, 1953 and 1954, which he deposited in the Merchants National Bank of Chicago, Illinois, and subsequently withdrew therefrom, were within his complete dominion and control, and large portions thereof were actually expended by him for his personal benefit. By the receipt of these funds he derived readily realizable economic value in the year of receipt.

"Petitioner's tax returns for the years in question were prepared on the cash receipts basis by an accountant, Daniel D. Contarsy, from information furnished by the petitioner. Contarsy had no knowledge of the receipt by the petitioner of funds from the Harlew Agencies, Inc. or the Security Mutual Life Insurance Company, and none of such funds were reported by petitioner in his returns for the year 1951 to 1954 inclusive."

Thus, under the facts in this case, the same were recited by the detailed special findings of the trial court, which findings of fact are not here challenged, the entirety of the monies obtained by the petitioner which were not included in his returns for the taxable years in question, were funds which the petitioner obtained by means which caused him to be "guilty of the crime of embezzlement of such funds as a principal".

4. The Conclusions of Law.

In the expression of the Trial Judge's Conclusion as a Matter of Law (R. 14, 15) there is found what constitutes an almost express repudiation of the doctrine of this court laid down by it on February 25, 1946 in *Commissioner of Internal Revenue* v. *Laird Wilcox*, 327 U.S. 404. In this statement of findings the Trial Judge held as a matter of law that:

> "The law is that financial or monetary gain to a taxpayer, whether lawfully or unlawfully acquired, constitutes taxable income to the taxpayer in the year when he has such control over it that, as a practical matter, he derives readily realizable economic value from it. It is immaterial whether the receipt of funds by a taxpayer results from misappropriation, embezzlement, or from other lawful or unlawful acts. The fact that in a subsequent year or years a taxpayer has made restitution of part, or all of funds previously received, is of no significance in determining whether the funds were taxable gains in the year in which they were received or appropriated by him. The precise nature of the criminal activity involved, whether it be embezzlement or other crimes, if any, in acquiring the funds here in dispute is not determinative of, and has no bearing on, the question whether such funds are taxable gains to the defendant. Hence, whether the misappropriation or diversion of funds by the defendant constituted, or may be regarded as constituting, the crime of embezzlement, or larceny, or grand theft, or obtaining money by false pretenses, or some other crime or crimes under the applicable state laws is a matter neither relevant nor material to the issues here presented."

5. The Sentence.

Upon the judgment of the Trial Court so finding the petitioner guilty on all counts as charged, the petitioner was committed to the custody of the Attorney General for imprisonment for a period of one year on Count 1 and for a period of two years on Counts 2, 3 and 4 of the Indictment, the sentences imposed on Counts 2, 3 and 4 being ordered to run concurrently with each other, but consecutively to the sentence imposed on Count 1 (R. 17), thus resulting in a three year sentence for the petitioner.

SUMMARY OF ARGUMENT.

The instant case presents for the determination of this Court the single question of whether funds obtained by means of the actual and specially found crime of embezzlement constitute taxable income in the hands of the embezzler, a result which was specifically negated by this Court in *Commissioner* v. *Wilcox,* 327 U.S. 404, a decision of this Court which was not disturbed, as has so often been incorrectly argued, by the subsequent opinion in *Rutkin* v. *United States,* 343 U.S. 130, but which, on the contrary, was explicitly reaffirmed in *Rutkin,* as well as being again thereafter directly approved in law and rationale in *Alison* v. *United States,* 344 U.S. 167 (1952), wherein the peculiar nature of the crime of embezzlement was noted by this Court.

In *Wilcox* it was pointed out that a taxability was conditioned upon (1) a claim of right to the funds obtained, and (2) the absence of a definite and unconditioned obligation to repay. Both of these factors are lacking where monies are obtained by embezzlement, similarly as to where monies are obtained by loan.

Until the decision of the Seventh Circuit here on certiorari, no reported case has treated *Wilcox* as overruled, but all have applied its doctrine in similar factual situations.

Congress, having power to determine taxability, nevertheless left the rule of *Wilcox* undisturbed in its complete overhaul of the Internal Revenue Code in 1954.

Since no *gain* is realized by an embezzler in his obtaining possession of embezzled funds, no tax liability attaches thereto.

ARGUMENT.

1. The Wilcox Case and its Background.

The question of whether embezzled funds were taxable was until 1946 unresolved by authoritative decision of this Court. The taxability of such monies until this time was, however, generally affirmed by various decisions of the Tax Court (*Spruance* v. *Commissioner of Internal Revenue*, 43 BTA(f) 221; *Kurrle* v. *Commissioner of Internal Revenue*, Prentice-Hall, 1941, BTA Mem. Dec. Par. 41,085) as well as by the Administrative rulings of the Department of Internal Revenue (General Counsel's Mem. 16572, XV-1 Cum. Bull. 82 (1936)).

Among the Circuits themselves, no unanimity existed. The Eighth Circuit, by its decision in *Kurrle* v. *Helvering*, 126 F.2d 723 (March 14, 1942), in affirming an order of the Board of Tax Appeals taxing an embezzler from an Iowa bank upon the proceeds of his embezzlement and the profits earned by the use of such funds, had held that, although the embezzler was a trustee *ex maleficio*, "embezzled funds and profits earned by the embezzler through the use of such funds constitute taxable income". In the Fifth Circuit, however, less than two months after the *Kurrle* case a diametrically contrary view was adopted in the case of *McKnight* v. *Commissioner of Internal Revenue*, 127 F.2d 572, (April 29, 1942). In order to resolve this conflict, this Court granted the Government's application for certiorari from a decision of the Ninth Circuit (*Wilcox* v. *Commissioner of Internal Revenue*, 148 F.2d 933, (March 30, 1945) wherein the *McKnight* case's reasoning had been sanctioned, thus giving rise to what is *the first*,

the last and the only direct expression of this Court on the taxability of embezzled funds.

This, of course, is the now classic and "landmark" case of *Commissioner of Internal Revenue* v. *Laird Wilcox*, 327 U.S. 404-416, handed down by this Court on February 25, 1946. In *Wilcox* the taxpayer, a bookkeeper for a transfer and warehouse company in Reno, Nevada, had over a five year period from 1939 through 1942 diverted miscellaneous sums of money belonging to his principal, pocketing them, and thereafter losing practically all of his ill-gotten gains in various gambling houses in Reno. His improper takings during the calendar year of 1941 amounted to $12,748.60. His acts constituted criminal embezzlement under the laws of Nevada, and for this crime he was indicted and convicted in the courts of that state in 1942, and sentenced to serve from 2 to 4 years in prison, from which he was paroled in 1943. The Commissioner determined that the taxpayer was required to report the $12,748.60 which he embezzled during 1941 and in this determination was sustained by the Tax Court. After the reversal of the Tax Court by the decision of the Ninth Circuit above referenced, certiorari was here granted "because of a conflict among circuits as to the taxability of *embezzled money*". (Emphasis supplied).

The Government argued (as it has here below) that taxability rested "upon the enjoyment by the taxpayer of privileges and benefits so substantial and important as to make it reasonable and just to deal with him as if he were the owner, and to tax him on that basis." To this argument this Court said "We cannot agree," continuing:

> "Taxable gain is conditioned upon (1) the presence of a claim of right to the alleged gain and (2) the absence of a definite, unconditional obligation to repay

or return that which would otherwise constitute a gain. Without some bona fide legal or equitable claim, even though it be contingent or contested in nature, the taxpayer cannot be said to have reached any gain or profit within the reach of Section 22(a). See *North American Oil Consolidated* v. *Burnett*, 286 U.S. 417, 424, 76 L.ed. 1197, 1200. Nor can taxable income accrue from the mere receipt of property or money which one is obligated to return or repay to the rightful owner, as in the case of a loan or credit."

* * *

"We fail to perceive any reason for applying different principles to a situation where one embezzles or steals money from another. Moral turpitude is not a touchstone of taxability. The question, rather, is whether a taxpayer received a statutory gain, profit or benefit. That the taxpayer's motive may have been reprehensible or the mode of receipt illegal has no bearing upon the application of Section 22(a).

"It is obvious that the taxpayer in this instance in embezzling the $12,748.60, received the money without any semblance of a bona fide claim of right. And he was at all times under an unqualified duty and obligation to repay the money to this employer. Under Nevada law, the crime of embezzlement was complete whenever an appropriation was made; the employer was entitled to replevy the money as soon as it was appropriated or to have it summarily restored by a magistrate. The employer, moreover, at all times held the taxpayer liable to return the full amount. The debtor-creditor relationship was definite and unconditional. All right, title, and interest in the money rested with the employer. The taxpayer thus received no taxable income from the embezzlement.

"This conclusion is unaltered by the fact that the taxpayer subsequently dissipated all of the embezzled funds in gambling houses. The loss or dissipation of money cannot create taxable income here any more than the insolvency or bankruptcy of an ordinary

borrower causes the loans to be treated as taxable income to the borrower."

"Sanctioning a tax under the circumstances before us would serve only to give the United States an unjustified preference as to part of the money which rightfully and completely belongs to the taxpayer's employer.

"*The Tax Court's determination that the embezzled money constituted taxable income to the embezzler, a result in accord with its prior decisions on the issue, involved a clear-cut mistake of law.* The court below was, therefore, justified in reversing that judgment." (Emphasis supplied.)

In the decision of the *Wilcox* case, seven Justices joined, no part being taken by Mr. Justice Jackson, and Mr. Justice Burton dissenting.

Subsequent to *Wilcox*, the Internal Revenue Service itself in General Counsel's Memo. 24945, Cum. Bull. 1946—2, 27, reversed its prior position regarding the taxability of embezzled funds such as in the *Wilcox* case and recognized them *not* to be taxable.

From the position enunciated in this General Counsel's Memorandum, the Internal Revenue Service has never retreated, and this Memorandum is in full force and effect today.

It is to be noted that *Wilcox* did not hold, as has heretofore in some cases been incorrectly argued on behalf of various taxpayers, that the illegality of the means by which the funds were obtained thereby rendered them non-taxable. This is clearly not now and has never been the law. Unlawful *gains*, where the same are realized under a claim of right and without a definite and unconditional obligation to repay, are taxable equally with law-

ful *gains*, and such state of the law was not disturbed by *Wilcox*. The sole question authoritatively and finally determined by *Wilcox* was the express recognition of the non-taxability of monies obtained wrongfully—without claim of right—when the obtention of such monies created a definite and unconditional obligation to return the same. In short, *Wilcox* declared that monies obtained by embezzlement are simply not *gains*.

After the decision in the *Wilcox* case and the following General Counsel's Memo referenced above, no question as to the non-taxability of funds so obtained seems to have been raised in reported decisions until 1952.

2. The Rutkin Case and its effect upon the Law.

However, on March 24, 1952, this Court, by a sharply divided bench, (5 to 4) handed down the decision in the case of *Rutkin* v. *United States of America*, 343 U.S. 130, 96 L.ed. 833, 72 Sup. Ct. 571, holding money obtained by extortion to be taxable. The petitioner in the case at bar wishes to here and now state that with the *Rutkin* holding, he has no quarrel. Indeed, it is not felt that Rutkin in any way altered the law as it had been prior to *Wilcox* nor did it in any way change or obliterate in any part whatsoever the rule of *Wilcox*. Unfortunately, however, it must be acknowledged that *Rutkin* has formed the basis for much dicta, as will be hereinafter seen, which is to the effect that the rule of *Wilcox* was in some way diluted or modified by *Rutkin*, and it was upon *Rutkin* that the decision below was clearly bottomed. However, the petitioner believes that the actual effect of *Rutkin* was merely to prevent an extension of *Wilcox's* doctrine into areas of taxability in which the law was already clear in affirming that gains were taxable. (See *Humphries* v. *Commis-*

sioner, 125 F.2d 340, wherein extortion or kidnap proceeds had previously to *Rutkin* been held taxable and in which certiorari was denied in 317 U.S. 637, 87 L.ed. 513, 63 Sup. Ct. 28). *Rutkin* did not alter *Wilcox's* holding or destroy its rationale.

It is important here to closely analyze the facts in *Rutkin*. Rutkin was here indicted for willful failure to include in his tax return for 1943, $250,000.00 which he had received during that year from one Joseph Reinfeld. The circumstances of the receipt of the funds were complex. Reinfeld had been engaged in 1929 with the defendant in a bootlegging operation known as the "High seas venture". The defendant was taken into the enterprise because of fear that he or his associates would otherwise create trouble, and was given a 6% interest in the venture for which he appears to have been paid. In 1933 (upon repeal of prohibition) Browne Vintners Co., a New York corporation, was organized to engage in the liquor business by Reinfeld and others. Rutkin was not included in this new venture, but thereafter asserted a claim of a 6% interest in this enterprise as well. In 1940 all of the stock of Browne Vintners was sold for $7,500,000.00 to a purchaser who also assumed $8,000,000.00 of the company's debts, but no money was then paid to Rutkin who was not a stockholder of record, nor a beneficial owner of any of the company's stock but who was nevertheless actively claiming and asserting an interest therein. Thereafter repeated demands were asserted by Rutkin upon Reinfeld for sums ranging up to $500,000.00, Rutkin "threatening use of a gun" and to "kill Reinfeld and Reinfeld's family unless his demands were met." Finally, in 1943, Reinfeld paid Rutkin the $250,000.00 in question, and *Rutkin thereupon signed and Reinfeld received a general release purporting to release Reinfeld, Browne Vintners Company and others from all claims of Rutkin.*

It is to be noted that this Court (page 134 of the Official Reports) pointed out in describing the demands of Rutkin:

> "Throughout this melodrama petitioner (Rutkin) asserted he was entitled to the payments he demanded from Reinfeld because of petitioner's former interest in Browne Vintners Company."

Thus, clearly, Rutkin received the money under a definite "claim of right". It is of no consequence that such claim was in fact invalid, and was not given credence by Reinfeld. The term "claim of right" means what the expression implies—a claim of right—not an actual right. Such a claim of right was the basis upon which Rutkin demanded the money, then received the same, and for which he ultimately executed his written release. In the opinion below (*Rutkin* v. *United States*, 189 F.2d 431) the court applied the "claim of right" doctrine by holding that the extortioner received the money with a "semblance of a bona fide claim of right", since Reinfeld never denied the presence of a claim of right by him for some money, and the extortioner, when asking his victim for money, called it "my money", and gave a general release at the time he was given the money. As pointed out below "Reinfeld has unmistakably considered the $250,000 to be Rutkin's property. He left Rutkin in undisputed possession of it for the last eight years."

This Court declared such money, so obtained to be taxable. In its opinion, after recognizing that Rutkin's "control over the cash so received was such that, in the absence of Reinfeld's *unlikely repudiation* of the transaction and demand for the moneys' return, petitioner could enjoy its use as fully as though his title to it were unassailable", (emphasis supplied) and pointing out that unlawfully obtained income is taxable similarly to lawful gains, the Court said:

"There is little doubt now that where unlawful gains are secured by the fraud of the taxpayer they are taxable. In the instant case it is not questioned that the $250,000 would have been taxable to petitioner if he had obtained it by fraudulently inducing Reinfeld to believe petitioner's false claims to be true. That being so, it would be an extraordinary result to hold here that petitioner is to be tax free because his fraud was so transparent that it did not mislead his victim and his victim paid him the money because of fear instead of fraud.

"We do not reach in this case the factual situation involved in *Commissioner* v. *Wilcox*, 327 U.S. 404, 90 L.ed. 752, 66 S. Ct. 546, 166 ALR 884. We limit that case to its facts. There embezzled funds were held not to constitute taxable income to the embezzler under Section 22(a). The issue here is whether money extorted from a victim with his consent induced solely by harassing demands and threats of violence is included in the definition of gross income under Section 22(a)."

Clearly, it would seem, *Rutkin* does not overrule *Wilcox*. Indeed, quite on the contrary, it reaffirms *Wilcox*. *Rutkin* simply recognizes that the same factual situation as in *Wilcox* did not there pertain. The salient facts present in *Wilcox* (and in the *James* case at bar) which are at variance with *Rutkin*, can be best summarized:

	In James and Wilcox	In Rutkin
Was there an embezzlement?	Yes	No
Was there a "claim of right"?	No	Yes
Was there a "likely repudiation or demand for return"?	Yes	No
Did legal title to the money pass?	No	Yes.

Very simply, *Rutkin* was an extortion—not an embezzlement case. Rutkin got the money claiming that he was entitled to it, (although such claim was not valid, and the real reason for payment was fear of physical violence induced in the payor). Neither James nor Wilcox claimed any right to the funds thus received. Rutkin got good legal title to the money, and, most significantly, as pointed out by this Court, it was, as a practical matter, extremely unlikely that Reinfeld, who paid because of fear, would thereafter repudiate his deal and seek the recovery of the funds. Neither Wilcox nor James, however, at any time obtained legal title to the money of which they took possession. The rightful owner of the same could (and in fact, in the case of *James* actually did) pursue the same. In the *James* case, as in *McKnight* v. *Commissioner of Internal Revenue, supra,* "the takings were large, and under a system of bookkeeping that made discovery and the demand for recovery eventually certain." (See 127 F.2d at page 574). *Rutkin,* on the contrary, obtained clear legal title to the funds, could and did use them as his own, and never at any time had occasion to fear or anticipate that any person whomsoever would challenge his title to the same. The money in short was as a practical matter his. The money taken by James and by Wilcox was not theirs, and hence did not constitute a *gain.*

It is to be observed that the two mandatory indicia of taxability established in *Wilcox i.e.* (1) claim of right to the gain and (2) absence of a definite, unconditional obligation to repay still applied after *Rutkin.* In the *Rutkin* case there was both a claim of right, and, in view of the circumstances of the extortion, there was a practical absence of a definite unconditional obligation to repay.

3. Affirmation of Wilcox in Alison.

An even more forceful demonstration of the continued vitality of the *Wilcox* holding is the case of *Alison* v. *United States*, 344 U.S. 167 (1952), decided by this Court several months after the *Rutkin* decision. The taxpayer there claimed a deduction in a current year on the ground that prior embezzlement by an agent had but recently been discovered. The issue was whether such a deduction should be allowed or whether the taxpayer's only opportunity to claim it occurred in the year when the embezzlement took place. This Court pointed out that the Commissioner frequently allows such current deductions "to prevent hardships and injustice," and stated:

> "This Treasury practice evidently stems at least in part *from the special nature of the crime of embezzlement.* Its essence is secrecy. Taxpayers are usually well aware of all the circumstances of financial losses for which tax deductions are allowed. Not so when a trusted advisor or employee steals. For years his crime may be known only to himself. *He may take money planning to return it and he may return it before there is discovery.* Furthermore, the terms embezzlement and loss are not synonymous. The theft occurs, but whether there is a loss may remain uncertain. One whose funds have been embezzled may pursue the wrongdoer and recover his property wholly or in part. See *Commissioner* v. *Wilcox*, 327 U.S. 404. Events in the *Alison* case show *the practical value of this right of recovery.* A substantial proportion of the embezzled funds was recovered in 1941, ten years after the first embezzlement occurred. This recovery alone is ample refutation of the view that a loss is inevitably 'sustained' at the very time an embezzlement is committed." (Emphasis supplied)

This language compares significantly with the following from the *Rutkin* decision, *supra*, at pp. 136-137:

> "Petitioner's control over the cash so received was such that, in the absence of Reinfeld's *unlikely repudiation of the transaction and demand for the money's return*, petitioner could enjoy its use as fully as though his title to it were unassailable." (Emphasis supplied)

In *Alison*, this Court was not confronted with competing theories of taxability, but rather with examining closely the practical as well as the legal effects of the embezzlement transaction. The opinion emphasizes, and turns upon, "*the practical value of this right of recovery*" possessed by the victim. In economic effect (as opposed to moral import) embezzlement thus closely resembles borrowing, and is markedly different from larceny, robbery, burglary, extortion, unlawful business activities, and other like forms of illegal activity. In these latter, there is no practically valuable right of recovery; in the unlawful business cases, there is usually no unconditional right of recovery; and in all of them, there is no societal pattern of the money being returned before or after detection, nor of the transaction subsequently being amended and characterized by the parties as a loan or advance. It may well be that the extortionist realizes a taxable gain for the reason that, although the victim possesses a right of recovery, this right exists only on a theoretical and non-practical level; if the victim is frightened enough to hand over the money, he will probably remain frightened enough to forbear seeking its return. But the same thing *cannot* be said of embezzlement from an employer where, as every judge and lawyer knows, restitution is commonplace.

4. Decisions of Lower Courts.

It is believed by the petitioner that the decision of the Court of Appeals for the Seventh Circuit here on certiorari constitutes the only pronouncement of any lower court in which the rule of *Wilcox* has not been observed. These cases will be reviewed in this brief for the purpose of demonstrating how the rationale of the *Wilcox* v. *Rutkin* distinctions heretofore argued has been recognized and expanded upon by lower courts.

a. Decisions of lower Courts distinguishing Wilcox on basis of Rutkin.

Although in no reported case whatsoever, decided by any court, save in *James*, has *Wilcox* been overruled, and although all cases recognize in varying degrees the rule of Wilcox, parts of the language of the decision in *Rutkin* has, from time to time, been relied upon in the opinions of lower courts as the basis for distinctions drawn from the *Wilcox* case. As a result, it has been sometimes said that *Rutkin* "diluted" or emasculated" *Wilcox*. It is believed that an analysis of the cases will disclose, however, that such is not the case. *Rutkin* merely *limited Wilcox* to its facts and prevented the extension of its doctrine into other fields of taxability. We shall now proceed to consider and review, in their chronological sequence, the several cases in which *Wilcox* has been distinguished and in which gains of various types and characters have been held taxable.

As a word of introduction to these cases, it is suggested that after *Wilcox* it became fashionable for counsel representing taxpayers to seize upon the *Wilcox* case, regardless of whether or not their clients had or had not obtained the gains in question under a *claim* of right, regardless as

to whether or not their clients were under a real or only a fancied "obligation to return", and regardless as to whether or not an embezzlement prosecution was likely or even possible, and contend themselves to be under *Wilcox*. In cases where embezzlement prosecutions were never possible or contemplated—in cases where the taxpayer had clearly obtained good legal title to his gains and had invested the same for this profit as his own money—in cases where the embezzlement defense as patently an afterthought, the same never having been even raised or considered upon trial—visionary and resourceful defense counsel, nevertheless, girded themselves with *Wilcox's* language.

All manner of swindlers, extortioners, bribees, panders, mountebanks and miscellaneous scalawags, suddenly found themselves, by dint of far fetched and unlikely theories, transformed into alleged "embezzlers." This entirely natural and concomitant result of the *Wilcox* case kept courts busily engaged in pointing out to taxpayers, in effect, that their self-claimed "embezzlements" existed only in the fancy of their own lawyers, and that no embezzlement prosecution had been undertaken or was likely. In the case at bar, it goes without saying, that the embezzlement is not a theory developed by the petitioner's own counsel, but, much to the contrary, was specifically found by the court as a special finding of fact and, in the greater part, is the subject of a real and existing indictment for such crime now pending in the courts of the State of New Jersey, and concerning which indictment the Supreme Court of Illinois, on March 20, 1959, affirmed the order of the Circuit Court of DuPage County, Illinois, extraditing the petitioner to Essex County, New Jersey for trial on indictments charging embezzlement and conspiracy to em-

bezle. (*James* v. *Lynch*, 16 Ill. 2d 380 (1959), Petition for rehearing denied May 19, 1959)

We now proceed to a chronological consideration of opinions of lower courts distinguishing *Wilcox* on its facts:

In *Rollinger* v. *United States*, 208 F.2d 109 (8th CA) (1953) an Iowa farmer practiced a confidence game on one Mrs. Clara B. Mieras, obtaining certains gains as profits by selling her zircons instead of diamonds and obtaining further gains by falsely representing that he needed money to pay as protection or bribes to the F.B.I., which the defendant claimed was investigating stolen diamonds, and to others as "hush money".

After his conviction, the defendant sought to wrench himself under the *Wilcox* case, as well as raising certain other defenses equally of no basis. The Eighth Circuit, on page 112, lost little time in properly disposing of the *Wilcox* contention:

> "Defendant contends that although he may have received large sums of money as a result of these fraudulent threats and misrepresentations, the funds so acquired by him were in the nature of embezzled funds. He relies strongly on the case of *Commissioner* v. *Wilcox* (Citation). In that case it was stipulated that the funds were in fact embezzled. The funds here were acquired either as profits on sales or as funds acquired by fraud, misrepresentation, or extortion."

In short, Rollinger's contention that he was under *Wilcox* did not even approach correctness. He got good legal title to the monies obtained, he asserted a "claim of right" to them, and he was simply not an embezzler, and no one had ever suggested he was—except his own attorney. Nor was there any likelihood that he would have been required to account for the monies so extorted and swindled.

In *Briggs* v. *United States*, 214 F.2d 699 (4th CA) (1954) one defendant, Clark, a property superintendent for the Carolina Aluminum Company and the other defendant, Briggs, operated for several years under an agreement whereunder Briggs secured purchasers to whom lands of the corporation would be sold at prices exceeding those reported to the corporation. They divided the excess between themselves, and paid no tax on the same, using the proceeds as their own money. Their fraud was not discovered until after their indictment for violation of the Internal Revenue Laws.

In striking down the contention that the case fell under *Wilcox*, the decision refused to go into the embezzlement claim, saying:

> "We think it perfectly clear that through the fraudulent transactions in which they were engaged they received moneys over which they had complete control, which they treated as part of their estates, which resulted in economic value to them *and for which they probably never would have been required to account, had it not been for the fraud on the revenue they were perpetrating in connection therewith.*"

It is to be observed that no embezzlement prosecution here took place or was contemplated. Indeed, the deal was such that both men simply realized a secret profit. The Court of Appeals in its decision took particular care to comment approvingly on the following language of the trial judge:

> "* * * I can't believe there is any belief on their part that any part of it (the money) belonged to the company or that it had any claim on it, and they used it for six or seven or eight years; and it was not until after the company jumped them after this indictment that they took the position that they were possibly guilty of embezzlement."

That James knew who was the owner of the money is clear. That he used any part of it as his own was unproven. That he asserted any claim or right is false. That he was "jumped" by the rightful owners is the fact in evidence, and is a result that must have been obvious to him at all times. The embezzlement in the *James* case is not a position taken by the petitioner after his indictment. It is, rather, a position taken by the Grand Jurors of Essex County, and one which, to James' concern, is being now strongly and vigorously asserted by the prosecutor of that jurisdiction, and that he obtained the funds in question by means of the crime of embezzlement is a fact which was specifically, consciously and deliberately found by the District Court.

In *Kann* v. *Commissioner of Internal Revenue*, 210 F.2d 247 (3rd CA) (1954), the defendants were brothers and during all the years in question both were shareholders and directors of three corporations and were the principal owners thereof. From 1936 through 1941, through checks and overstated credits in the personal accounts of the brothers, they concealed payments to themselves in the amount of $675,881.76. In litigation before the Tax Court they contended the assessment of income taxes and fraud penalties were invalid on the ground that these sums had been embezzled and did not constitute income under Section 22(a) of the Internal Revenue Code and cited the *Wilcox* case in support of their position. The Court in its opinion stated first that:

> "In the first place, although taxpayers here strenuously urge that the Kanns embezzled the money *there is not, as the court below emphasized, any external evidence of that crime. They were never indicted or convicted of the alleged embezzlement, nor does it appear that those concerned with the corporate affairs*

of (the corporations) or anyone else, ever urged prosecution. • • • The important distinctions between the *Wilcox* case and this appeal, however, concern the relationship of the taxpayers to their employers. As noted, whereas Wilcox was merely a salaried employee, the Kanns controlled both corporations." (Emphasis supplied).

In a vigorous dissent, Judge Kalodner pointed out:

"The plain import of the majority's position is that it construed *Commissioner* v. *Wilcox* to have been overruled by *Rutkin* v. *United States*, although it paid lip service to *Wilcox* in attempting to distinguish its factual situation from that in the instant cases.

"First, as to whether Rutkin overruled Wilcox:

"I don't believe it did. Nor do I believe that the majority has the right to assume that it did. Like John Alden, the Supreme Court of the United States can and should speak for itself. *Wilcox* held in the plainest terms that embezzled money does not constitute taxable income to the embezzler. Until the Supreme Court tells us otherwise, we are required to follow *Wilcox* in embezzlement cases. It hasn't told us anything different since *Wilcox*. It is true that in *Rutkin* it distinguished between embezzled money and extorted money and held the latter to be taxable income. That circumstances is no reason why an inferior court should assume that *Wilcox* was overruled. Had the Supreme Court intended in *Rutkin* to overruled *Wilcox* it could, and undoubtedly would have said so. But the fact is that it did not and while it limited *Wilcox* 'to its facts' it reiterated its holding in that case that 'there embezzled funds were held not to constitute taxable income to the embezzler under Section 22(a).'"

In commenting on the *Kann* decision, it must be again pointed out that in attempting to escape from *Wilcox*, the

Court here bottomed its rationale on the fact that the defendants controlled the corporations from which the funds were taken *and that their prosecution for embezzlement was unlikely.* Sugh, we again repeat, is not the case with *James. Kann* is simply a case where "embezzlement" was the result of defense counsels' ingenuity—and was not an offense such as upon which prosecution was likely or pursuit of the funds probable. It is here, with the *Kann* case, that we first find a tacit acknowledgment by some of the courts that purely theoretical and technical "embezzlements" will not be treated as real embezzlements which have been made the subject of prosecution. It is here first said in a case distinguishing Wilcox: "They were never indicted or convicted". This languge will in later cases increasingly occur, indicating that some courts (though far from all) have imposed an added qualification for non-taxability of wrongfully obtained money taken under no claim of right, and where a real obligation to repay exists; that is, that there should be an embezzlement prosecution threatened or actual. But even if such an added qualification does exist, the petitioner falls within it.

In *Marienfeld* v. *United States,* 214 F2d 632 (8th CA) (1954), the taxpayer had an agreement with a meat packer whereunder he had authority to sell certain meat products on the packer's behalf and was required to account for the proceeds of sales at intervals. However, he converted the proceeds of some sales to his own use, failing to account for sales or accounting for sales of products, some of which he processed, at a price lower than the sale price. He failed to report or pay tax on such conversions and was indicted and convicted for violation of the Revenue Laws.

The Eighth Circuit frankly indicated it was unable to reconcile *Rutkin* with *Wilcox*, but after giving lip service to both cases, then approached the problem on the basis of which case came closer to the facts at issue. The Court pointed out that this case differed from *Wilcox* in that here the relationship of the parties was such that the obligation to repay was not immediate, but that it was in *Wilcox*, and stressed the fact that here, as in *Rutkin*, the defendants' "control over the cash so received was such that, in the absence of (the payor's) *unlikely repudiation of the transaction and demand for the moneys'* return, petitioner could enjoy its use as fully as though his title to it were unassailable."

In *James*, unlike *Marienfeld*, the obligation to repay was not deferred, but was immediate, as in the case of *Wilcox*. Likewise, in *James*, unlike *Marienfeld*, there was a likely repudiation and demand. In fact, the evidence shows such occurred. Again, and most importantly, in *James*, like *Wilcox*, but unlike *Rutkin* and *Marienfeld*, the embezzlement was made the subject of prosecution, real and existing, and was not merely a theory designed to escape a tax obligation.

In *United States* v. *Bruswitz*, 219 F.2d 59 (2d CA) (1955), the defendants were convicted for the fraudulent failure to report as taxable income the proceeds of commercial bribes or "kick-backs" received in 1949, 1950, and 1951. Their reliance upon the *Wilcox* case upon appeal failed, the court distinguishing the cases on their facts, saying:

> "* * * There a bookkeeper embezzled funds from his employer which he thereafter lost by gambling. The Supreme Court held that these funds were not income within Section 22(a) because of the embezzler's con-

tinuing obligation to restore these funds to his employer—a liability which would have been subordinated to a government lien had the tax been found appropriate. The situation here is quite different. The N.Y. Penal Law distinguishes between embezzlement and commercial bribes, only the former requiring the actual taking or withholding of money or property from the true owner. Compare N.Y. Penal Law Sections 1290 and 439. McK. Consol. Laws, c. 88. That distinction is particularly relevant to the facts before us, since there is no indication that the kickbacks resulted in any loss to defendant's employers."

Although the case is clearly distinguishable on its facts from the *Wilcox* decision, as pointed out by the Second Circuit, the case is here cited, anticipatorily, since the same may be relied upon by the respondent because of the dicta contained in the decision to the effect that "it is difficult to perceive what, if anything, is left of the *Wilcox* holding after *Rutkin*". For the respondent to place weight upon such expressions in *Bruswitz* would be error, since the same Court of Appeals (2d CA) and two of the same Judges (Frank and Medina) who participated in *Bruswitz*, did thereafter in *J. J. Dix* v. *Commissioner of Internal Revenue*, 223 F.2d 436, considered *post*, expressly reaffirm the vitality of *Wilcox* and limited their decision in *Bruswitz* to its facts. Thus, if it can be said that *dictum* can be overruled, such was done in *Dix*.

In *Berra* v. *United States*, 221 F.2d 590 (8th CA), (1955), we find a "kick-back" case in which the taxpayer was the business manager of a labor welfare organization who arranged with a painting contractor to overstate his bills and finally received the amounts of the overpayments from the contractor. The Court held these amounts to

constitute taxable income, despite the defendant's reliance upon the *Wilcox* doctrine, saying:

> "We do not think the facts in the present case bring it within the scope of the *Wilcox* decision. The prosecution proved and the appellant admitted that the money he received came, not from his employer, Labor Health Institute, but from Schmidt. That this was not a case of embezzlement was recognized by the trial court * * * the court pointing out that embezzled funds must be received in the course of employment, which was not so here."

The case is obviously distinguishable in that the claim of an embezzlement in *Berra* was almost frivolous. Schmidt, the contractor who kicked-back the funds to Berra, was never in the employ or agency of any person whomsoever, unlike Saperstein and James, who were both agents of the Union, and Saperstein who was agent of the Security Mutual Life Insurance Company as well.

In *Drybrough* v. *Commissioner of Internal Revenue*, 238 F.2d 735 (6th CA), (1956), two individuals who owned or controlled all stock of a corporation, cashed checks payable to a corporation and divided and kept the proceeds in order to avoid payment by the corporation of a 95 percent excess profits tax. They contended these funds were embezzled under the rule of *Wilcox*, and no tax was therefore due.

This contention was dismissed by the Court of Appeals for the Sixth Circuit in an opinion, interesting insofar as the same, although questioning "how much vitality continues to reside in the *Wilcox* rule since the Supreme Court decision in *Rutkin*", proceeds to then reaffirm the "claim of right" doctrine, as the basis of its decision in saying:

> "We think the Tax Court was clearly correct in concluding that the petitioners took the corporation's funds under a claim of right and with the implied consent of the corporation."

The case is additionally worthy of comment as being exemplary of the lengths to which defendants, utterly outside of the *Wilcox* rule, have attempted to avail themselves of its provisions. Here, there was obviously a taking under a claim of right. There was no conceivable likelihood whatsoever of any demand for a return of the monies so taken from the wholly owned corporation, and there was no envisionable possibility of any embezzlement prosecution.

In *United States* v. *Wyss*, 239 F.2d 658 (7th CA), (1957), we have another "kick-back" case in which the defendant received about $20,000.00 for having procured contracts with the City of Fort Wayne, treating the money as his own by investing it and keeping the returns on the investment. It was admitted that he intended to and did exercise personal dominion over the funds for his own benefit. On appeal, for the first time, it was argued that these funds were not his in law and were subject to recovery by the City of Fort Wayne or, in the alternative, they were embezzled. The Court pointed out that upon trial the defendant failed to take advantage of Rule 23(c) of the Federal Rules of Criminal Procedure, and, therefore, left unerystallized the question of fact as to the embezzlement, thus "the trial judge was not foreclosed from disbelieving on the evidence before him that Wyss was an embezzler".

Holding in effect that the funds were thus "kick-backs" and not embezzlements, the Court said:

> "Until the funds in question are reclaimed if they were 'kickbacks' we thing they constituted taxable in-

come despite Wyss' alleged vulnerability, if any, under Indiana law to return it when and if, or because of a duty of the Indiana Attorney General or County Attorney to institute recovery proceedings. We are not rescinding *Wilcox*, as defendant's anticipatory argument suggests but observing that *Wyss cannot come within the Wilcox holding unless the district judge found him to be an embezzler. And as both sides unanimously agree this Court does not weigh evidence nor find facts.* Defendant has confused weight and credibility with questions of law." (Emphasis supplied)

Here in the case at bar we have clearly an instance where "the district judge found him to be an embezzler" as a carefully considered portion of the Special Findings of Fact entered upon the conclusion of the trial. It is not a case where there was failure of the petitioner to avail himself of the advantage of Rule 23(c).

The practice of defense counsel straining at facts and evolving theories whereby their clients might be conceived of as embezzlers, previously noted in this brief, and which has regrettably resulted in some of the expressions contained in the cases considered in this portion, is noted in *Wyss* by Judge Finnegan who said:

> "Following in the wake of *Commissioner of Internal Revenue* v. *Wilcox* (citation) an occasional taxpayer has firmly insisted upon being recognized and classed as a self-made embezzler * * *."

In the case at bar, however, the insistence on the existence of an embezzlement was initially asserted by the Grand Jury and District Attorney of Essex County, New Jersey and was additionally found specially as a fact by the Trial Judge.

In *Schira* v. *Commissioner of Internal Revenue*, 240 F.2d 672 (6th CA), (1957), little of value appears, but the same is included here merely as being a decision in which *Wilcox* is distinguished. The distinction is not difficult. Schira stole buckets, galvanized cans and other articles from his employer, sent them by the truck load to a second individual, who in turn sent them to a third individual, who sold them on the open market, and the proceeds of such sales were divided among the three. Indeed, it was far fetched to claim that monies received from the sales were funds which were embezzled from any person whomsoever.

In *Prokop* v. *Commissioner of Internal Revenue*, 254 F.2d 544 (7th CA), (1958), the taxpayer was an office manager for an electrical union and directly received permit fees from temporary workers which she did not report on the books of the union and which she divided with the business manager. In this civil proceeding, it was held that the funds retained by her constituted taxable income despite her reliance on *Wilcox*.

The case actually recognizes *Wilcox*, but turns largely on the fact that Mrs. Prokop had never been "charged with or proceeded against for embezzlement" and that her act has been condoned by her employers, the court saying:

> "Mrs. Prokop here, was never *charged with or proceeded against for embezzlement*. By negotiation she agreed to pay and paid to the Union a definite sum of money in settlement of its claim against her and was given a full and complete release. Any money that had come to her by way of permit fees thus became free of any conflicting rights in the Union. This case is more like *Kann* v. *Commissioner of Internal Revenue*, 3 Cir., 210 F.2d 247 and *Rutkin* v. *United States*, 343 U.S. 130, 72 S.Ct. 571, 96 L.ed. 833. The latter case

limited the authority of the *Wilcox* case to its precise facts. In the *Wilcox* case taxpayer had embezzled funds; had been prosecuted for and convicted of embezzlement; his act had not been condoned nor forgiven by his employer; the embezzled funds in his hands continued to be the property of his former employer. Here, Mrs. Prokop was not charged with embezzlement and whether or not her withholding the permit fees from her employer legally amounted to embezzlement the release she received from Local 494 left no claims by the Union outstanding against her."

Actually, the defense of embezzlement was not pressed in the Tax Court below—and here again we have a case where the embezzlement was largely a theoretical and legalistic thing falling within the quoted comment of Judge Finnegan in the *Wyss* decision referenced above.

Again, it is noted that in *Prokop* we had not an embezzlement, as in *Wilcox* and *James*, but rather an extortion, as in *Rutkin*. That this is so appears from the Government's own argument advanced in its Brief filed in the *Prokop* case, from which we now quote:

"Significantly, in *Rutkin* v. *United States*, 343 U.S. 130, the Supreme Court held the extorted funds were taxable income to the extortionist, and (p. 138) limited *Wilcox* 'to its facts'. The *Rutkin* case involved a situation (obtaining money from another by threats to kill) which is not dissimilar to that in the instant case; the taxpayer's extraction of money by collusion and duress was somewhat comparable though less violent, namely, requiring payments of the permit fees to herself in her own right as the operating head of the union from the temporary permit workers, failing which she would—and did—cause their discharge from local employment."

In *Macias* v. *Commissioner of Internal Revenue*, 255 F.2d 23 (7th CA), (1958), we have a civil proceeding in which one of the questions was whether certain payments received by the taxpayer's husband (with whom she had filed a joint return) were taxable. These were "side payments" or "kick-backs". It was claimed in the Tax Court that these funds (although paid directly to the recipient in his own name) were embezzlements under *Wilcox*. The Tax Court decided this issue of facts adversely to the taxpayer, and the Court of Appeals correctly stated that it would not disturb such findings, saying:

> "Relative to the first issue, petitioner contends that the payments received by Arturo were embezzled funds, and, therefore, not taxable, under the decision of *Commissioner of Internal Revenue* v. *Wilcox*, 327 U.S. 404, 66 S. Ct. 546, 90 L.Ed. 752, Reliance is placed upon the definition of 'embezzlement' contained in Sec. 343.20(1) of the 1947 Wisconsin Statute. It is hardly open to question but that Arturo illegally received payments from Warschawski. Whether such payments constituted embezzlement under the Wisconsin law or any other is doubtful. (In this connection, in fairness to petitioner it should be stated that there is evidence in the record more favorable to petitioner than is shown in the evidentiary findings of the Tax Court heretofore recited). However, we need not indulge in a discussion of this issue because, as petitioner concedes, it is an issue of fact. Such issue was by the Tax Court found adversely to petitioner. We discern no reason to disagree, and we accept the finding."

In *Smith* v. *United States*, 257 F.2d 133 (10th CA), (1958), the defendant, a pander, was convicted for falsely stating to a special agent of the Internal Revenue Service that "he had received no income from any type of prostitution". The facts were that Smith had four prostitutes

working for him. He took their earnings from them, representing that he would keep the same and use such at some future date to acquire a legitimate business in which they would be interested along with him. Again, we had the far fetched contention that this person was an "embezzler", and hence such pander's fees were not income.

In denying this strangely ingenious claim and rightfully distinguishing *Wilcox*, the Court reaffirmed the "claim of right" doctrine, pointing out that in *Wilcox* (as in *James*) the money was taken with no semblance of a claim of right, whereas Smith received the funds from the women "joined in a cooperative undertaking", and that thus "He had a claim of economic right and interest in it".

b. Decisions of Lower Courts reaffirming the full vitality of Wilcox.

From the foregoing it might appear that all pertinent cases, since *Rutkin*, have had the effect of eroding the *Wilcox* doctrine. Such, however, is most definitely not the case. The cases considered in the foregoing portion of this Brief were generally occasioned, as has been pointed out, by the many attempts of non-embezzlers (where prosecution for such crime was impossible or, at best, highly improbable) to have themselves declared criminals of such category in order to escape tax liability.

It is to be noted that in not one of the twelve cases reviewed above was there ever even as much as the threat of an embezzlement indictment. Such existed only in *Wilcox* and again in the *James* case at bar, where actual indictments for such crime were returned.

That *Wilcox's* rule was unchanged by *Rutkin* seems implicit in the decision reached in the early case of *Lashell's*

Estate v. *Commissioner of Internal Revenue*, 208 F.2d 430 (6th CA) Dec. 4, 1953, where the question of the taxability of certain bribe payments made by the taxpayer to the purchasing agent of one of its customers was considered. The Commissioner contended that the money received by the taxpayer and thereafter paid as bribes should be included in the company's return. This money had been received by the taxpayer without claim of right, since it had been agreed that the same be paid as "commissions" to the purchasing agent for the corporation's customer. In refuting the contention of the Commission, the Court said:

> "It is well settled that the mere receipt and possession of money does not by itself constitute taxable income. Familiar examples are borrowed money, rent collected by a rental agent, payment of a loss under an insurance policy, and a money judgment collected by an attorney for a client. 'The very essence of taxable income, as that concept is used in Section 22(a), is the accrual of some gain, profit or benefit to the taxpayer. This requirement of gain, of course, must be read in its statutory context. Not every benefit received by a taxpayer from his labor or investment necessarily renders him taxable. Nor is mere dominion over money or property decisive in all cases. In fact, no single, conclusive criterion has yet been found to determine in all situations what is a sufficient gain to support the imposition of the income tax. No more can be said in general than that all relevant facts and circumstances must be considered.' *Commissioner* v. *Wilcox, supra*, 327 U.S. at page 407, 66 S.Ct. at page 548.
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> "Using this concept of taxable income, the Supreme court adopted the 'claim of right' rule for the purpose of determining whether the receipt and possession of money constituted income. This rule was expressed

as follows in *North American Oil Consolidated* v. *Burnet, Commissioner*, 286 U.S. 417 at page 424, 52 S. Ct. 613, at pages 615, 76 L. Ed. 1197; 'If a taxpayer receives earnings under a claim of right and without restriction as to its disposition, he has received income which he is required to return, even though it may still be claimed that he is not entitled to retain the money, and even thought he may still be adjudged to restore its equivalent.' This rule was restated in *Commissioner* v. *Wilcox, supra*, 327 U.S. at page 408, 66 S. Ct. at page 549, as follows: '* * * taxable gain is conditioned upon (1) the presence of a claim of right to the alleged gain and (2) the absence of a definite, unconditional obligation to repay or return that which would otherwise constitute a gain. Without some bona fide legal or equitable claim, even though it be contingent or contested in nature, the taxpayer cannot be said to have received any gain or profit within the reach of Section 22(a).' The rule was recently approved and applied in *United States* v. *Lewis*, 340 U.S. 590, 71 S.Ct. 522, 95 L.Ed. 560.

"In the present case there was no claim of right by the company to the commissions charged, collected and thereafter paid over by it to Moon."

Again, and more recently, in *J. J. Dix, Inc.* v. *Commissioner of Internal Revenue*, 223 F.2d 436 (2d CA) June 2, 1955, certiorari denied, 350 U.S. 894, (in an opinion by Judge Frank, joined in by Judge Medina) two of the three Judges who had participated in the earlier decision of *United States* v. *Brusewitz, supra*, the Court expressly reaffirmed *Wilcox* in considering the tax liability of the president of a corporation for corporate funds in the amount of $56,736.82 which he had misappropriated. The language of the Court on the question was:

"The Tax Court held that Jacob Dix realized taxable income of $56,736.82, *i.e.*, the amount of corporate funds he misappropriated. We think this was error. Jacob withdrew those moneys from the corporate bank accounts without the consent, coerced or otherwise, of the company. That he was the president did not amount to corporate consent. We have here a simple case of embezzlement, not one involving a receipt under any color of right. Accordingly, we think *Commissioner of Internal Revenue* v. *Wilcox*, 327 U.S. 404, 66 S.Ct. 546, 90 L.Ed. 833, governs, and that *Rutkin* v. *United States*, 343 U.S. 130, 72 S.Ct. 571, 96 L.Ed. 833, does not apply. We do not believe that *Rutkin* completely obliterated *Wilcox*. 'Since the court in *Commissioner of Internal Revenue* v. *Wilcox* flatly held that embezzled funds were not taxable income to the embezzler, and in the *Rutkin* case has unequivocally held that extorted funds were taxable income to the extortionist, the line of demarcation lies between those rather closely related factual situations and must be determined by the facts in the individual case.' *Marienfeld* v. *United States*, 8 Cir., 214 F.2d 632, 637. In the instant case, the facts are close to those of *Wilcox* and lack the distinguishing features found in *United States* v. *Bruswitz*, 2 Cir., 219 F.2d 59, and cases there cited. See also the dissent of Judge Kalodner in *Kann* v. *Commissioner*, 3 Cir., 210 F.2d 247, 253."

Obviously, in *James* we are even much closer to *Wilcox* than was *Dix*. In *James* the embezzler was not in control of the Union or the Insurance Company, whereas *Dix* was the president of the victim corporation. In *James* we have real, actual pusuit of the monies embezzled, an utter absence of any claim of right, and, moreover, an existing prosecution for embezzlement and the fact of the embezzlement of the funds so found by the District Court.

The Court's attention is also invited to the recent decision in *United States* v. *Peelle*, 159 F. Supp. 45, Eastern

Dist. of N. Y. February 4, 1958, wherein *Rutkin* and *Wilcox* were closely examined. Here so-called "Secret" corporation bank accounts were used by Henry E. Peelle, an officer of the corporation, without knowledge or consent of other officers of the corporation, and monies extracted therefrom for his own personal use. It seems difficult to perceive how a set of facts more closely analogous to the *James* case could be envisioned. The device utilized to effect the embezzlement in both *Peelle* and *James* was virtually identical. In holding *Wilcox* controlling under such a set of facts, the Court in its fulsome and well reasoned opinion said:

> "In support of the defendants' contention that this embezzled money is not taxable to defendant Peelle, *Commissioner of Internal Revenue* v. *Wilcox*, 1946, 327 U.S. 404, 66 S. Ct. 546, 90 L.Ed. 752, is cited. The Tax Court had ruled that embezzled money constituted taxable income to the embezzler. The Supreme Court rules that this was a clear-cut mistake of law."
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> "The amounts taken out of these so-called 'secret' bank accounts and embezzled by Henry E. Peelle and converted to his own use and later returned, therefore, are not taxable income."

In *United States* v. *Mavroleon*, 58-1 U.S.T.C. 68, 188 (U.S.D.C. S.D. N.Y. 1958) income taxes were assessed on moneys given to the taxpayer, an employee of a ship chandlery firm, for disbursement by him to third parties. The court held:

> "This defendant either disbursed the money proceeds of the cashed checks or he embezzled it. If he disbursed it, he had no income. If he embezzled it, it is not taxable as income. *Commissioner* v. *Wilcox*, 327 U.S. 404."

Finally, we come to the recent decision in *United States v. Vera Green*, (decided March 31, 1959) in the United States District Court for the District of Massachusetts.

The pertinent facts of the *Green* case, as quoted from the unpublished decision of Judge Wyzanski, are:

> "At all material times Vera Green was the clerk, secretary and director of Botwinik Brothers of Massachusetts. She owned 40 shares out of the 750 shares which had been authorized and issued. Without any authorty from the board of directors and in violation of her duty as an officer, director and employee, she utilized for her personal purposes, or for the purposes of her husband or a corporation in which she was interested, corporate assets belonging to Botwinik Brothers of Massachusetts, Inc. It is quite unnecessary at this stage to recite the form in which these diversions occurred. (Author's Note: These embezzlements amounted to $139,000.00). Some of them were by way of petty cash vouchers, others by way of accounts payable invoices, and others in other ways. From the facts which have been stipulated it is clear that many of these diversions were subject to prosecution and conviction under the State law of Massachusetts governing larceny and, more particularly, under the provisions which incorporate the old common law of embezzlement. In fact, up to now Mrs. Green has not been prosecuted in the state courts for this larceny. It does not appear whether she will hereafter be prosecuted in view of the admissions made in connection with these proceedings."

The ruling the Court then follows:

> "With respect to the joint income tax returns, I am cabined by the decision rendered by the Supreme Court of the United States in *Commissioner* v. *Wilcox*, 327 United States 404 (1946). The Supreme Court of the United States 13 years ago decided that embezzled money does not constitute taxable income to

the embezzler under Section 22(a) of the Internal Revenue Code. It makes no difference whether I do or do not agree with that ruling. The Supreme Court has not impaired its authority. Indeed, in refusing to review the decision of the Second Circuit rendered in *J. J. Dix, Inc.* v *Commissioner,* 223 Federal 2d, 436, it seems as though the Supreme Court of the United States is quite content to leave the *Wilcox* doctrine stand. Moreover, the Congress of the United States has not chosen to alter the doctrine in the *Wilcox* case. It is undeniable that the decision of the Supreme Court was reported to Congressional Committees and that despite this report and despite a recodification and general overhauling of the Internal Revenue Code within the last decade, no legislative alteration in the *Wilcox* doctrine has been made. It would be unseemly for a District Judge, in the light of these circumstances, not to follow the *Wilcox* case, and it would be particularly undesirable for a single District Judge to create fine distinctions between the *Wilcox* case and the facts of this case, which is a criminal proceeding.

"Needless to say, if the Government feels that distinctions urged before me are of great importance, and should be presented to a bench of several judges, it is possible for the Government to proceed civilly against these defendants, and then if the Government loses in the civil action to take appropriate appeal to bring the matters before higher tribunals.

"In all cases it is of importance for the Court not only to act justly but to appear to act justly, and it would appear to many people to be shocking in a criminal case for a single judge to enunciate fine-spun distinctions between that case and what has commonly been regarded as a landmark case in the Supreme Court of the United States.

"The motion is granted *in toto.* The defendant stands acquitted."

5. Comments on Bases Expressed in Opinion Below.

The petitioner finally desires to briefly comment on certain of the expressions contained in the opinion below (R. 19) as reasons advanced by the Seventh Circuit Court of Appeals for its affirmance of the District Court's judgment of conviction herein. (273 F.2d 5).

For one thing, it is observed that the pronouncement of the Seventh Circuit below to the effect that the rule of *Wilcox* was in question since it "resorted to *state* law in determining the absence of a bona fide claim of right to the alleged gain and the existence of an obligation to repay it" (R. 21), thus permitting state law to establish criteria of federal taxability. It is felt that the short answer to this position is simply that it is not true. The holding of *Wilcox* is that the embezzlement of money is not a taxable event for the purposes of the federal income tax. The term "embezzlement", like the term "loan", which also refers to a non-taxable event, has a universally accepted meaning which is subject only to minor and immaterial variations under state law. This meaning was expressed simply and directly by this Court in *Moore* v. *United States*, 160 U.S. 268, 269 (1895) as:

> ". . . a fraudulent appropriation of property by a person to whom such property has been instrusted or into whose hands it has lawfully come."

Since the decision in *Rutkin* this Court has continued to refer to embezzlement, in a general sense and without regard to state law, as having important and specific tax ramifications. *Alison* v. *United States, supra.*

It is also readily acknowledged, as stated in the opinion below, that "Congress establishes its own criteria and the state law may control only when the federal taxing

act by express language or necessary implication makes its operation dependent upon state law" (R. 21).

But if Congress has intended to tax monies obtained by embezzlement, it could and probably would have altered the *Wilcox* rule in the broad revision of the Internal Revenue Code of 1954.[1]

Also true, as stated in *Rutkin* and reiterated in the opinion below, "An unlawful gain, as well as a lawful one, constitutes taxable income when its recipient has such control of it that, as a practical matter, he derives readily realizable economic value from it" (R. 20).

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[1] In connection with the failure of Congress to change **Wilcox**, it is to be noted that in H.R. 8854, a Bill introduced in the 86th Congress, an effort is being made by the Congress to change the rule of **Wilcox**. This Bill provides, **in toto**, as follows:

"A BILL

To amend the Internal Revenue Code of 1954 to provide that the proceeds of certain crimes shall be included in gross income.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That (a) part II of subchapter B of chapter 1 of the Internal Revenue Code of 1954 (relating to items specifically included in gross income) is amended by adding at the end thereof the following section:

'Sec. 78. PROCEEDS OF CERTAIN CRIMES.

'The proceeds of embezzlement, or of larceny, burglary, or robbery, shall be included in gross income for the taxable year in which derived, except to the extent restored to the rightful owner before the expiration of the period provided by section 6511 for filing claim for credit or refund with respect to such year.'

(b) The table of sections for such part II is amended by adding at the end thereof the following new item:

'Sec. 78. Proceeds of certain crimes.'

Sec. 2. The amendments made by the first section of this Act shall apply only with respect to the proceeds of crimes committed after the date of the enactment of this Act."

But this quotation from *Rutkin* fails to consider the true issue, *i.e.*, what constitutes a *gain*. The holding of this Court in *Wilcox* was not that unlawful gains are tax-free; it was, rather, that the *event* of embezzlement *does not result in a gain* to the taxpayer because he holds without ownership or claim of right, is under an immediate, unconditional and practically significant obligation to repay. It is events, not moneys which are subject to tax. The embezzler simply does not realize a gain, that is, because his receipt of the funds is immediately offset by an exactly corresponding liability which has true economic significance. The transaction thus differs markedly from any other, lawful or unlawful, which results in a gain; it resembles most closely a loan, where the supplier of the money also possesses an unconditional and practically valuable right of recovery.

Section 22(a) of the 1939 Internal Revenue Code has, of course, long been construed as evidencing Congress' intent to tax all *gains and profits* except those specifically exempted. No one disputes this principle, but as applied to the present issue, to repeat this truism merely begs the question. In ruling that Wilcox did not realize a gain, making him subject to tax, this Court pointed out that he had received the money without any semblance of a bona fide claim of right and was at all times under an unqualified duty and obligation to repay the money, title to which was with his employer and with whom his debtor-creditor relationship was definite and unconditional.

Lastly, the petitioner cannot agree with the conclusion that proceeds of embezzlements should be considered taxable, as "Congress, in enacting Section 22(a) 'applied no limits as to the source of taxable receipts nor restrictive labels, as to their nature;' and that it thereby intended

'to tax all gains except those specifically exempted', and thus 'to bring the taxing power to bear upon all receipts constitutionally taxable * * *'" (R. 21).

It should scarce be argued that the failure of Congress to specifically exempt embezzled funds from the general definition of Gross Income contained in the Internal Revenue Code (Section 22(a), Internal Revenue Code of 1939, and Section 61 of Internal Revenue Code of 1954) is to be construed as indicating the intent of Congress to include such funds. In the first place, as has been heretofore noted, *Wilcox* declared such funds not included in the concept of gain or profit, and the Congress did not see fit in 1954 to legislatively disturb such declaration when the effect of *Wilcox* was well known and a general revision of the Internal Revenue Code was made. Secondly, to so argue would be to gratuitously assume that embezzlement does result in a *gain*, despite the ruling of this Court to the contrary. One may well ask, where in the Code Congress specifically exempted "*gains*" arising from loans? Section 22(b) of the 1939 Code sets forth sixteen sub-sections enumberating types of *gains* which are exempt from tax. Gifts, which obviously are *gains*, are mentioned, whereas the proceeds of loans are no where touched upon. The obvious reason is that loans and embezzlement alike give rise to corresponding and significant obligations to repay, which means they do not result in "*gains*" and that neither, therefore, requires listing as a *gain* which is exempt from the tax.

For these reasons the *Wilcox* decision in no way contravenes the presumed intention of Congress but merely holds that a transaction of this type does not invoke tax liability because the taxpayer has failed, in both fact and in law, to make a net economic advance.

The foregoing leads to the following conclusions:

(1) Although the broad *rationale* of the *Wilcox* case may appear to have been violated by the *Rutkin* decision, the *holding* of *Wilcox* is still the law, as demonstrated by the facts that:

(a) This Court in *Rutkin* did *not* overrule *Wilcox* but explicitly reaffirmed its holding;

(b) This Court in *Alison* cited *Wilcox* with approval, referred to the special nature of the crime of embezzlement and distinguished embezzlement from other unlawful acquisitions on the ground that the victim possesses an unconditional and practically valuable right of recovery;

(c) Congress did not disturb the *Wilcox* holding despite a complete overhaul of the Internal Revenue Code in 1954; and

(d) The Court of Appeal and District Courts, other than in the case here at bar, have not treated *Wilcox* as overruled and have applied its doctrine in similar fact situations.

(2) The facts of the instant case, being specifically found by the Trial Judge and not here in dispute, are controlled by the *Wilcox* rule. The petitioner obtained the funds by embezzlement, with no claim of right, either actual or pretended, and under circumstances which vested in the true owner an immediate, unconditional and a practically valuable right of recovery.

(3) Accordingly, petitioner did not receive unreported taxable income.

CONCLUSION.

The Judgment against Petitioner should be reversed and judgment of acquittal directed.

Respectfully submitted,

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